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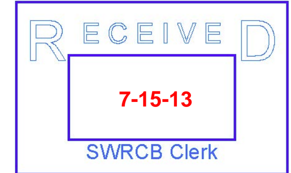
7/23/13 Board Meeting- Items 7-10
Various MMPs
Deadline: 7/16/13 by 12 noon



July 15, 2013

VIA EMAIL TO COMMENTLETTERS@WATERBOARDS.CA.GOV

Ms. Jeanine Townsend
Clerk to the Board, and
Chair Marcus and Members of the
State Water Resources Control Board
1001 I Street, 24th Floor 95814
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Re: **Comments to Lincoln, LSC, Mantini and Rodeo proposed orders - July 23 Board Meeting**
Client-Matter No. 39688.00001

Dear Ms. Townsend and State Water Board members:

On behalf of our client Riviera West Mutual Water Company, we submit the following comments on the four (4) proposed draft Administrative Civil Liability ("ACL") Orders for the Lincoln Avenue Water Company ("Lincoln"), Lubricating Specialties Company ("LSC"), Mantini Management, Inc. ("Mantini"), and Rodeo Owner Corp. ("Rodeo"). Each of the draft orders for these entities contains nearly identical language related to the doctrine of laches that wrongfully attempts to disavow this equitable principle's application to the Water Boards and to Mandatory Minimum Penalties ("MMPs").

The doctrine of laches clearly applies to the administrative agencies, such as the Water Boards, and court cases have held as much. (*See accord Tehama Market, et al v. Central Valley Regional Water Quality Control Board*, Butte County Superior Court, Case No. 141395, Ruling on Petition for Writ of Mandate (April 6, 2009) (holding Regional Board erred by finding that laches was not an available defense to the complaint).) This *Tehama Market* case clearly held contrary to the finding contained in the LSC Draft Order that states:

> "Given the express statutory mandate imposed by the Porter-Cologne Act, we conclude that the water boards do not have the authority to invoke laches to override the legislative mandate."

(*See* LSC Draft Order at pg.6.) Thus, this sentence should be removed from the LSC Order.

I. Comments on Laches Language Common to All Four Draft Orders.

Each of the four draft orders contain virtually identical language and findings related to laches. The following provides the language and comments on each paragraph (and its citations):

A. "Related to the concept of statute of limitations is an equitable principle of laches. Laches is a court-made, equitable doctrine based on the "principle that those who neglect their rights may be barred from obtaining relief in equity."[9] It is a defense by which a court denies relief to a claimant who has unreasonably delayed or been negligent in asserting a claim, when that delay or negligence has prejudiced the party against whom relief is sought.[10] The defense of laches requires unreasonable delay plus either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the delay.[11] "[L]aches is not available where it would nullify an important policy adopted for the benefit of the public."[12] Further, it is well-settled that the burden to establish laches lies with the party raising it.[13]

9 *Feduniak v. California Coastal Com'n* (2007) 148 Cal.App.4th 1346, 1381.
10 Black's Law Dict. (7th ed. 1999) p. 879, col. 1.
11 *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 68.
12 *Feduniak v. California Coastal Com'n, supra*, 148 Cal.App.4th at p. 1381.
13 *Wells Fargo Bank v. Goldzband* (1997) 53 Cal.App.4th 596, 628."

(*See* Lincoln Draft Order at pg. 4; LSC Draft Order at pg. 6 (first sentence is slightly reworded); Mantini Draft Order at pg. 5; and Rodeo Draft Order at pg. 4.)

The last two sentences of this paragraph are not completely accurate and should be revised. The Water Boards cite the *Feduniak* case for the proposition that where application of the laches doctrine would nullify a policy adopted for the public protection, laches may not be raised against a governmental agency. (*Feduniak v. California Coastal Com'n* (2007) 148 Cal.App.4th 1346, 1381.) However, this case is inapplicable to the draft orders at issue here because applying laches here would not nullify any policy adopted for public protection. MMPs are after-the-fact penalties, not orders that directly affect environmental quality or public health, like the restoration order in the *Feduniak* case, or the well closure orders in the cited *Wells Fargo Bank* case.

The MMP statutes were initially adopted to address the issue of the Water Boards exercising their enforcement discretion to not impose any penalties on dischargers, even where effluent limitations were being violated. Now MMPs are rotely imposed years after the events with no demonstration of actual impacts on water quality, and even for events characterized as "low threat" or for reporting failures, which may not have any impact on the environment at all.

Another equally if not more important legislative goal of MMPs was to provide "<u>swift and timely enforcement</u> of waste discharge requirements."[1] This objective would not be hindered by

[1] *See City of Brentwood v. Central Valley Regional Water Quality Control Bd.* (2004) 123 Cal.App.4th 714, 724 (citing to legislative history Stats.1999, ch. 92, § 2, subd. (d) [Assem. Bill No. 1104]; ch. 93, § 2, subd. (d) [Sen. Bill No. 709]).

the application of laches in the matters before the State Water Board here, and may encourage Water Boards to act more quickly when apparent violations occur.

Swift and timely enforcement is no longer possible in several of these cases for which draft orders are proposed due to the Water Board's extended delays, a fact that will not change if the doctrine of laches is applied in these matters. It cannot be said that the public policy behind the statute was aimed at allowing the delayed enforcement to assess MMPs, which the Water Board now apparently proposes to allow to be delayed indefinitely in these draft orders. Had the Water Boards acted more quickly and issued an Administrative Civil Liability ("ACL") Complaints earlier, the alleged non-reporting and effluent limitation exceedance issues in most all of these cases might have been corrected sooner.

Further, under the clear language of 2010 Enforcement Policy (SWRCB 2010 Enforcement Policy, at pgs. 8 and 23) implementing the Water Code and the MMP statute, these MMPs all should have been issued within 18 months of their discovery. For violations alleged before 2010, which were controlled by the 2002 Enforcement Policy, the MMPs should have been issued within 7 months (*See* 2002 Enforcement Policy at pgs. 2, 4, 29 (Feb. 19, 2002) ("RWQCBs should issue mandatory minimum penalties within **seven months** of the time that the violations qualify as mandatory minimum penalty violations, or sooner if the total mandatory penalty amount is $30,000 or more. This will encourage the discharger to correct the violation in a timely manner.").

The Enforcement Policy also *mandates* that the "Water Boards shall expedite MMP issuance if ... (b) the total proposed mandatory penalty amount is $30,000 or more." (SWRCB 2010 Enforcement Policy at pg. 23 (emphasis added).) Since the condition related to amount was met in three of the four matters contained in the draft orders, the Water Board violated this regulatory mandate, which was also adopted as an important public policy. This provides additional reasons why applying laches to address the delay in prosecuting the ACLs in most of these cases does not nullify or violate a public policy adopted for the benefit of the public since the delay itself was contrary to state regulations and policies implementing the legislative mandate.

As to the statement in the last sentence that it is "well-settled that the burden to establish laches lies with the party raising it," this needs to recognize that this burden can also shift as set forth in section D. below.

B. "Initially, we are not convinced that the doctrine of laches is applicable to a mandatory minimum penalty. As noted above, laches is a court-made, equitable doctrine. We have previously recognized our authority to import equitable principles into our adjudicative decisions.[14] Where the Legislature has spoken, however, equitable and court-made remedies give way to statutory mandates.[15] "Principles of equity cannot be used to avoid a statutory mandate."[16] Here, where there has been a violation subject to statutory mandatory penalties and unless an affirmative defense is proven, the Legislature has imposed an affirmative duty to impose the penalties, thereby depriving the water boards of their discretion to reduce the mandatory minimum penalty.[17] When the Legislature has spoken so clearly, we do not believe the water boards may invoke equitable principles to avoid that result.

14 See, e.g., State Water Board Order WQ 96 -04 -UST (Champion /LBS Associates Development Company), p. 6 (adopting equitable "common fund" doctrine for Underground Storage Tank Cleanup Fund reimbursements).
15 See *Modem Barber Colleges v. Califomia Employ. St. Com'n* (1948) 31 Cal.2d 720, 727 -728 (recognizing the Legislature's ability to define and limit equitable rights and remedies that are not in conflict with the Constitution).
16 *Ghory v. Al-Lahham* (1989) 209 Cal.App.3d 1487, 1492; see also 13 Witkin, Summary (10th ed. 2005) Equity, § 3, p. 284; *Lass v. Eliassen* (1928) 94 Cal.App. 175, 179 ("Nor will a court of equity ever lend its aid to accomplish by indirection what the law or its clearly defined policy forbids to be done directly. ").
17 Wat. Code, § 13385, subd. (h)(1); City of Brentwood v. Central Valley Regional Water Quality Control Bd., supra, 123 Cal.App.4th at p. 720."

(*See* Lincoln Draft Order at pgs. 4-5; LSC Draft Order at pg. 7; Mantini Draft Order at pg. 5; and Rodeo Draft Order at pg. 5.)

The Water Board provides no legal authority for its position that laches does not or cannot apply to MMPs. "The defense of laches has nothing to do with the merits of the cause against which it is asserted." (*Johnson v. City of Loma Linda*, 24 Cal. 4th 61, 77 (2000). "Laches constitutes an affirmative defense *which does not reach to the merits of the cause . . . .*" (*Id.* (citation omitted, italics in *Johnson*).)

Laches clearly applies even where legislative mandates exist. In the case of *Fountain Valley Hosp. & Med. Ctr. V. Bonta* (1999) 75 Cal.App.4th 316, the court held that laches could be applied when the Department of Health Services belatedly attempted to collect mandatory "overpayments" had made to a hospital regarding services provided to Medi-Cal patients. (*See Fountain Valley*, 75 Cal. App. 4th at 319-20; *see also* Cal. Code Regs. Tit. 22, § 51548 ("overpayments *shall* be collected")(italics added). Because MMPs sought in the Draft Orders and the overpayments sought in *Fountain Valley* are both mandated by law, it is clear that laches can apply per the analogous *Fountain Valley* case.

The Water Boards have the equitable power through the laches defense to dismiss the penalties for the alleged violations, and must do so in instances of unreasonable delay and prejudice to the party being issued a penalty. (*See Gates v. Department of Motor Vehicles* (1979) 94 Cal. App. 3d 921, 925 (delay and laches act as a bar to relief to untimely actions resulting in prejudice, and is applicable in administrative proceedings and quasi-adjudicative proceedings)(emphasis added).) Thus, each case must be screened to determine if the delay in prosecution was reasonable and if the delay caused any prejudice. Blanket determinations that laches does not apply to the Water Boards or to MMPs in general must be avoided.

In addition, laches is not being used, as suggested in this paragraph, to *reduce* the MMPs below the mandatory minimum levels, but to act more like an administrative statute of limitations. The policy of borrowing statutes of limitations is especially strong in penalty actions, such as these. (*See Adams v. Woods* (1805) 6 U.S. 336, 342 (explaining that it "'would be utterly repugnant to the genius of our laws' if actions for penalties could 'be brought at any distance of time'" and further stating "In a country where not even treason can be prosecuted after a lapse of three

years, it could scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture.").)

Just as the Attorney General would not be able to bring a case after 3 years under state law, or the EPA or citizens would not be able to bring a case after 5 years under federal law, the Water Boards also must have boundaries on how far back in time that they can pursue administrative enforcement. (*See* C.C.P. §338(i); 28 U.S.C. §2462.) This limitation provides certainty and prevents stale cases from being revived.[2]

Delay can cause prejudice to a defendant where witnesses or evidence are no longer available, witnesses forget what they observed, or the defendant incurs costs based on an assumption that the failure to prosecute means acquiescence in the prior conduct. (*3M v. Browner,* 17 F.3d at 1457*; see also In City and County of San Francisco v. Pacello* (1978) 85 Cal.App.3d 637, 645 (in the context of laches, 'prejudice is manifest' when delays cause important evidence to become unavailable).) For example, death of an important witness may constitute "prejudice" for the purpose of laches. (*See Bono v. Clark* (2002) 103 Cal. App. 4th 1409, 1420; *see also Stafford v. Ballinger* (1962) 199 Cal.App.2d 289, 296.) Thus, the facts of each case must explore both the reasonableness of the delay and the prejudice, if any, caused by the delay.

C. "Even if we could invoke the doctrine of laches to reduce the penalty, [Lincoln/LSC/Mantini/Rodeo] would fail to carry the burden of proof required by courts. First, as discussed above, the doctrine of laches is not available against a governmental agency where it would nullify an important policy adopted for the benefit of the public. Some courts have considered the possibility that a party might be able to assert laches against a governmental agency despite the existence of a public policy if the party could demonstrate that "manifest injustice" would otherwise result.[18] The Legislature adopted mandatory minimum penalties to promote streamlined, cost-effective enforcement and facilitate water quality protection.[19] The mandatory penalty statute itself evidences a strong legislative policy that certain types of permit violations always result in minimum penalties. There is nothing in the record that would suggest that [Lincoln/LSC/Mantini/Rodeo] has suffered anything remotely approaching a manifest injustice as a result of the delay in prosecuting the mandatory minimum penalty.

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[2] *See accord 3M Co. v. Browner,* 17 F.3d.1453, 1457 (D.C.Cir. 1994) ("Given the reasons why we have statutes of limitations, there is no discernible rationale for applying Sec. 2462 when the penalty action or proceeding is brought in a court, but not when it is brought in an administrative agency. The concern that after the passage of time 'evidence has been lost, memories have faded, and witnesses have disappeared' pertains equally to factfinding by a court and factfinding by an agency. *Order of R.R. Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349, 64 S.Ct. 582, 586, 88 L.Ed. 788 (1944). Statutes of limitations also reflect the judgment that there comes a time when the potential defendant 'ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations,' Note, Developments in the Law--Statutes of Limitations, 63 HARV.L.REV. 1177, 1185 (1950). Here again it is of no moment whether the proceeding leading to the imposition of a penalty is a proceeding started in a court or in an agency. From the potential defendant's point of view, lengthy delays upset 'settled expectations' to the same extent in either case. *See Board of Regents v. Tomanio*, 446 U.S. 478, 487, 100 S.Ct. 1790, 1796, 64 L.Ed.2d 440 (1980).")

18 See *Morrison v. California Horse Racing Bd.* (1988) 205 Cal.App.3d 211, 219 ("Where there is no showing of manifest injustice to the party asserting laches, and where application of the doctrine would nullify a policy adopted for the public protection, laches may not be raised against a governmental agency. ").
19 *City of Brentwood v. Central Valley Regional Water Quality Control Bd., supra*, 123 Cal.App.4th at p. 725.

(*See* Lincoln Order at pg. 5; LSC order at pg. 7; Mantini Order at pg. 6; and Rodeo Draft Order at pg. 5.)

Laches is clearly applicable to State agencies in both administrative proceedings and quasi-adjudicative proceedings. (*Gates v. Department of Motor Vehicles* (1979) 94 Cal. App. 3d 921, 925, *see also Brown v. State Personnel Board* (1985) 166 Cal. App. 3d 1151, 1160 ("In cases where no statute of limitations directly applies, but there is a statute of limitations governing an analogous action at law, the period may be borrowed as a measure of the outer limit of reasonable delay in determining laches"); *Steen v. City of Los Angeles* (1948) 31 Cal.2d 542, 546-47; *Robert F. Kennedy Medical Center v. Belshe* (1996) 13 Cal. 4th 748, 760 fn.9 (the defense of laches may operate as a bar to a claim by a public administrative agency, if the requirements of unreasonable delay and resulting prejudice are met).)

Next, the "manifest injustice" language quoted here seems from the case law (in both the *Morrison* case cited and the underlying case of *Mary R. v. B. & R. Corp.* (1983) 149 Cal.App.3d 308, 315-316) to have the same meaning as prejudice, and should not be implied to be an additional hurdle to be cleared in order to apply laches.

D. "Second, [Lincoln/LSC/Mantini/Rodeo] has not proved that the delay in prosecuting the mandatory minimum penalty was either unreasonable or that the water boards acquiesced to [Lincoln/LSC/Mantini/Rodeo]'s violations. [Lincoln/LSC/Mantini/Rodeo] received [a] notice[s] of violation and was on notice that it could be subject to further enforcement actions.

(*See* Lincoln Order at pg. 5; LSC order at pg. 8; Mantini Order at pg. 6; and Rodeo Draft Order at pgs. 5-6.)

The facts of each case must be looked at individually. If the Notice of Violation or, more importantly, the Complaint was sent more than three years after discovery of the first alleged violation, then the burden of proving that the delay was reasonable and that there was no prejudice would shift to the Water Board.

Case law clearly states that "the element of prejudice may be '<u>presumed</u>' if there exists a statute of limitations which is sufficiently analogous to the facts of the case [e.g., C.C.P. §338(i)], and the period of such statute of limitations [3 years] has been exceeded by the public administrative agency in making its claim. In the second situation, the limitations period is 'borrowed' from the analogous statute, and the <u>burden of proof shifts to the administrative agency</u>. To defeat a finding of laches the agency, here the [Water Board], must then (1) show that the delay involved in the case [] was excusable, and (2) rebut the presumption that such delay resulted in prejudice to the

opposing party." (*Fountain Valley Regional Hospital & Medical Center v. Bonta*, 75 Cal.App.4th 316, 324 (1999)(emphasis added).)

If the burden shifts, then the Water Board must include findings that the Water Board's delay in adequately investigating and timely prosecuting the matter or in initially filing the ACL Complaint was excusable or reasonable. These findings were not included and the Water Board also failed to rebut the *presumption* of prejudice. Therefore, without these findings, the equitable defense of laches should bar the imposition of the MMPs alleged.

E. Finally, [Lincoln/LSC/Mantini/Rodeo] has been on notice of the violations since it received its monitoring data, and has not proven any prejudice to it by delayed prosecution of the action.... In fact, because the payment of the mandatory penalty is not due until after final, administrative decisions, [Lincoln/LSC/Mantini/Rodeo] has benefited from the delayed assessment of the mandatory minimum penalty. We find that even if laches was available, [Lincoln/LSC/Mantini/Rodeo] has not satisfied its burden to support a laches defense.

(*See* Lincoln Order at pg. 5; LSC order at pg. 8; Mantini Order at pg. 6; and Rodeo Draft Order at pg. 6.)

The Draft Orders contain an argument that monitoring data/lab results constitutes sufficient notice of violations. (*See id; see also* LSC Draft Order at pg. 9 "**Lab Results as Sufficient Notice of Violations**.") Basically, the argument is that the permit holder should have known of its violations when it received and submitted its laboratory results and, therefore, it could not have been prejudiced by any delay in enforcement. This argument fails to understand several important points. For example, an exceedance of an effluent limitation is not necessarily a "violation" of a permit. There could be extenuating circumstances or defenses (e.g., upset, bypass, due to actions of a third party, etc.) that could make the event not considered to be an actionable violation. Thus, the filing of a discharge monitoring report may not put a permit holder on notice of an actual, actionable violation.

Further, this same argument could be used against the Water Board since these same monitoring reports should start the clock for administrative enforcement (as it does with enforcement under CCP 338(i)). The Water Boards' failure to timely act when it was on notice of these potential violations should become a bar to action at some point, when it could be argued that the Water Boards' inaction equates to acquiescence.

Prosecution of NPDES violations is made easier for the Water Boards due to self-monitoring and reporting, which is intended "to keep enforcement actions simple and speedy: '[o}ne purpose of the [monitoring] requirements is to avoid the necessity of lengthy fact finding, investigations, and negotiations at the time of enforcement.' Enforcement of violations should be based on relatively narrow fact situations requiring a minimum of discretionary decision making or delay." (*See City of Brentwood v. Cent. Valley Reg'l Water Control Rd.* (2004) 123 Cal. App. 4th 714, 723 (citations omitted).) The reasonable time in which the Water Boards must act on

apparent effluent limitation violations is set out in the Enforcement Policy (7 months or 18 months after discovery of potential violations, depending on when the exceedances occurred) and waiting more than three years would be, by definition, unreasonable.

As for the allegation of "benefit[ting] from the delayed assessment," this again presumes that the delay was reasonable and the issuance of delayed penalties would be authorized. For the reasons set forth in this letter, neither of these presumptions is warranted. Further, having large amounts of penalties hanging over an entity's head for years or decades may be detrimental in setting budgets or in receiving loans, grants, or insurance, issues that were not explored in these cases. (*See Fountain Valley Hosp. & Med. Ctr. V. Bonta*, 75 Cal.App.4th at 326 ("At some point, there must be finality … Otherwise, [ ] financial planning and rational allocation of its resources will simply be impossible. Such a result is neither fair nor socially desirable.") In addition, paying multiple smaller MMPs is often easier than paying a single large amount when MMPs have been lumped together over years and years. Thus, the State Water Board should urge Regional Boards and the Office of Enforcement to comply with the timeframes set forth in its Enforcement Policy instead of allowing unreasonable delay as is proposed in these draft orders.

II. Specific Issues Related to the LSC Draft Order's Laches Section

The LSC Draft Order goes beyond the language contained in the other draft orders and also states:

> LSC does assert that it was prejudiced because, if the Los Angeles Water Board promptly commenced an enforcement action, it could have taken action to prevent further violations. This argument would have some appeal if the violations had stretched over many years. Instead, all the effluent limitation violations subject to mandatory minimum penalties occurred within a relatively narrow 27-month period. That period is shorter than the three-year statute of limitations LSC encourages us to borrow.[] In other words, even if the Los Angeles Water Board had commenced enforcement promptly after the last effluent limitation violation, the results would have been no different. It would have had to impose the same mandatory minimum penalties, and the amount would be no different.

(*See* LSC Draft Order at pg. 8.) The facts set forth in this paragraph are not completely accurate. Table A attached to the LSC Draft Order shows that violations going back 13 years to 2000 were reviewed for the application of MMPs. The fact that no MMPs applied until 2005 does not justify claiming that the effluent limitation violations occurred "within a relatively narrow 27-month period."

Further, the Complaint in the LSC matter was not issued until August 11, 2010, more than 3 years *after* the statute of limitations in California Code of Civil Procedure section 338(i) would have run on the last alleged violation that occurred on April 23, 2007. The 3 year statute of limitations is not properly compared to the span of time over which alleged violations occurred, but instead runs from the time of the alleged violation itself. (*See* C.C.P. §338(i)(The statute of limitations runs from the discovery of facts constituting grounds for commencing actions under

their jurisdiction).) Thus, for the first alleged violation on January 25, 2000, the statute of limitation would have run three years after the discharge monitoring report for that discharge was submitted by LSC to the Water Board.

It is also important to reiterate that many of these alleged violations also could not be prosecuted under the federal Clean Water Act by either the U.S. Environmental Protection Agency or through a citizen's suit because the 5-year federal statute has run for any violations more than 5 years old. (28 U.S.C. §2462.) This federal statute of limitations has been held to apply to federal agency enforcement actions. (*See accord 3M Co. v. Browner,* 17 F.3d, 1453, 1457 (D.C.Cir. 1994)(applying federal statute of limitations in §2462 to EPA administrative penalty actions).) Thus, the State Water Board should similarly adopt an outside limit for when stale enforcement actions can no longer be prosecuted.

In sum, we request that the four draft orders be amended to be more case-specific and to remove over-arching pronouncements about the general applicability (or lack thereof) of laches to Water Board enforcement actions or MMPs. These potentially precedential orders might be used in the future to stymie the use of laches in a different case where unreasonably long delays and clear prejudice is demonstrated. These orders should not prejudge what might happen in such a different, future case.

III. Proposal to Conduct ACL Deliberations in Closed Session

As a final comment, the deliberations for these orders should not be held in closed session as proposed on the July 23, 2013 agenda. Such deliberations are not permitted to be conducted in closed session. (*See* Govt. Code §11120 ["In enacting this article, the Legislature finds and declares that it is the intent of the law that actions of state agencies be taken openly and that their deliberation be conducted openly."]; *see also* Govt. Code § 11132 ["Except as expressly authorized by [the Bagley-Keene Act], no closed session may be held by any state body." (emphasis added)].)

The stated objectives of the Bagley-Keene Act are to assure that "actions of state agencies be taken openly *and that their deliberation be conducted openly*." (Govt. Code § 11120 [emphasis added]; *see North Pacifica LLC v. California Coastal Comm'n* (2008) 166 Cal.App.4th 1416, 1432, *review denied* [holding that the agency took "reasonably effective efforts to notify interested persons of a public meeting [in order to] serve the statutory objectives of ensuring that state actions taken and deliberations made at such meetings are open to the public"].)

The Bagley-Keene Act only permits closed session deliberations in very limited circumstances not applicable here. Specifically, closed session deliberations are only allowed in specific circumstances enumerated in Government Code section 11126, such as personnel matters,[3]

[3] Gov't Code § 11126, subd. (a).

discussions with counsel regarding pending litigation,[4] and on decisions to be reached after proceedings required to be conducted under Chapter 5 of the Government Code or another similar provision of law.[5] (Govt. Code § 11126, subd. (c)(3).) Chapter 5 of the Government Code (beginning at Government Code section 11500) sets forth the procedures for formal administrative adjudications *before an Administrative Law Judge* or the staff of the Office of Administrative Hearings, *a separate agency*, and expressly does not apply to this adjudicative hearing before the same agency prosecuting the matter, here the Water Board. (23 C.C.R. §648, subd.(c).) Hearings before the Water Boards are conducted pursuant to Government Code sections 11400 *et seq*., not Government Code sections 11500 et seq. No equivalent or similar provision of law creates an additional exception to the stated Legislative purpose of the Bagley-Keene Act for deliberations conducted in connection with ACL complaints that are both filed and adjudicated by the Water Board itself. Thus, the Bagley-Keene Act does not authorize the Water Board to deliberate on ACLs in closed session and deliberations on these ACL matters should be held in open session so that interested parties may see how the final decisions are determined.

Thank you for your consideration of our comments.

Respectfully submitted,

DOWNEY BRAND LLP

Melissa A. Thorme
Special Counsel

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[4] Gov't Code §11126, subd.(e).

[5] While an argument could be made that 23 C.C.R. §647 *et seq.* contain "similar provisions" to those conducted under Chapter 5 of the Government Code, this argument ignores that these regulations state that "chapter 5 of the Administrative Procedures Act (commencing with section 11500 of the Government Code) does not apply to hearings before the State Board, any of the Regional Boards, or hearing officers or panels appointed by those Boards." (*See* 23 C.C.R. §648(c)(emphasis added).) We are unaware of any case law providing that Chapter 4.5 and 23 C.C.R. §648 *et seq*, procedures are "similar" to Chapter 5 procedures, since the procedures used by water boards do not include administrative law judges, accusations, notices of defense, discovery procedures, motions to compel, deposition procedures, proposed decisions, reconsideration procedures, petitions for reduction of penalty, direct judicial review, or continuance procedures. (*See* Gov't Code Chapter 5 - §11500 to §11524.) Thus, this argument would fail.